IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

THURSDAY, THE 5TH JULY 2007 / 14TH ASHADHA 1929

CRL.A.No. 731 of 2000()

CC.80/1998 of MUNSIFF-MAGISTRATE COURT, DEVICOLAM DT.19.4.2000 .
.....

APPELLANT: COMPLAINANT

N.GURUNATHAN, S/O.NAGAPPAN,
PROPRIETOR, M/S.SHANMUGHA FINANCE,
MUNNAR.

BY ADV. SRI.V.PHILIP MATHEW

RESPONDENT: ACCUSED

SMT.NISHA JOSEPH, D/O. P.M.JOSEPH,
RESIDING AT, PUTHENPARAMBIL HOUSE,
MUNNAR, K.D.H. VILLAGE

BY ADV. SRI.SOORAJ ELANJICKAL
PUBLIC PROSECUTOR SRI.C.K.SURESH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.R.UDAYABHANU, J

Crl.A.No.731 of 2000

Dated this the 5th day of July, 2007

JUDGMENT

The appellant is the complainant in C.C.No.80/98 with respect to the offence under Section 138 of the Negotiable Instruments Act which stands dismissed and the accused acquitted.

2. The case of the complainant is that he was running a financial institution by name Shanmugha Finance, Munnar. The accused was working as Manager since 30.6.1994 and that she committed misappropriation of gold and money forging records and registers and when confronted she executed an agreement to return the amounts and executed the impugned cheques on 4.11.1997 for a sum of Rs.3 lakh. The cheque when presented for encashment got bounced for want of funds in the account of the accused. Lawyer notice was sent within time and no payment was made.

3. The evidence adduced in the matter consisted the testimony of PWs' 1 to 4 and Exts. P1 to P6. The defence got

marked Exts. D1 to D5.

4. On a consideration of evidence adduced in the matter, it was held that the execution of the cheque has been proved. The accused happened to be acquitted on the ground that the complainant had sent Ext. D1 notice prior to the issuance of Ext. P5 notice. But Ext. D1 notice was defective as the name of the complainant has not been mentioned therein. He represented the cheque and issued Ext. P5 notice afresh. The court below upheld the contention of the accused that once he has issued a notice the cause of action arises and as the complaint has not been filed within the period stipulated from the receipt of the first notice, the prosecution cannot be sustained.

5. The specific case of the appellant is that Ext. D1 lawyer notice was defective as the name of the complainant was not mentioned therein. Ext. D1 only mentions as “you issued my client cheque no. ” and that the amount should be paid to “my client within 15 days of the receipt of the notice”. The counsel for the appellant has relied on the decisions reported in Dalmia cement (Bharat) Ltd. vs. Galaxy Traders & Agencies Ltd. 2001(6)

SCC 463 and the decision of this court in Aniyan Thomas Chacko vs. Thevarvelil Bankers 2006 (4) KLT 245 in support of his contention that in such instances the complainant is perfectly entitled to re-present the cheque and issue fresh notice. The contention in the first cited decision was that the accused had sent reply stating that he had only received the empty cover of the notice sent. In the decision of this court the payee had mentioned in the notice that the cheque was drawn on State Bank of Travancore whereas in fact the drawee bank was Indian Overseas Bank, Pathanamthitta. I find that the above decisions were not brought to the notice of the court below, evidently as the above decisions were rendered subsequent to the decision of the trial court. I find that in the instant case, the omission to mention the payee's name is a vital aspect that should not have been omitted. Hence, I find that representing the cheque and sending of a fresh notice as was done by the appellant cannot be held to be defective and the relief cannot be denied on the above ground. The rest of the findings of the court below is supported by evidence and is upheld.

6. In the circumstances, the findings of the court below is set aside. It stands established beyond reasonable doubt that the accused/respondent is guilty of the offence under Section 138 of the Negotiable Instruments Act. The accused is convicted and sentenced to imprisonment till the rising of the court and to pay a compensation of Rs.3 lakh and in default, to undergo simple imprisonment for six months. The accused is granted six months' time to remit the amount of compensation. He shall appear before the JFCM, Devikulam on 18.1.2008 to receive sentence.

The appeal is disposed of as above.

K.R.UDAYABHANU,
JUDGE

csl